IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

CWP No. 3845 of 1996
Date of decision 15.11.2006

Subedar Jagdish Singh .. petitioner

Versus

Union of India and others .. Respondents

CORAM: HON'BLE MR. JUSTICE M.M. KUMAR

PRESENT: Mr. Bhim Sen Sehgal, Advocate for the petitioner
Mr. S.K.Sharma, Standing Counsel for UOI

M.M.Kumar, J.

The prayer made by the petitioner in the instant petition filed under Article 226 of the Constitution is for issuance of a direction to the respondents to consider his case for promotion to the rank of Subedar w.e.f. 1.3.1994 when the persons junior to him was considered and promoted. A further prayer has also been made that the petitioner be given the benefit of tenure of service/ length of service provided for the post of Subedar which is upto 28 years of service and he be deemed to have superannuated on 1.10.1997 with all consequential benefits. The petitioner also claims that the action of the respondents in ante dating the date of promotion of respondent no.6 by considering him senior to the petitioner be also set aside as the same is illegal, malafide and contrary to the rules.

Brief facts of the case necessary for the disposal of the controversy raised in the instant petition are that the petitioner was enrolled in the Army on 16.9.1969. He was promoted as Lance Naik on 1.4.1981. He also secured promotion as Acting Naik, on 9.12.1983 and was further promoted as substantive Naik on 1.11.1985. On the basis of his service record he also acquired promotion to the post of Acting Havildar on

20.5.1988 and substantive Havildar from 1.6.1988. The petitioner was promoted as Naib Subedar on 13.4.1992 w.e.f. 1.1.1992. A comparative table showing the afore-mentioned data in juxta position with respondent no.6 is as under:

Rank	***Date of seniority of the petitioner***	***Date of seniority of respondent no.6***	***Amended dates P.1***
Date of enrollment	16.9.1969	16.8.1969	.....
L/NK	01/04/81	..	.....
Naik	ActingNaik 9.12.1983 (Substantive) 1.11.1985	1.7.1984 (Substantive) 1.4.1986	09.12.1983 1.11.1985
Hav.	Acting Hav. 20.5.1988 (Substantive) 1.6.1988	20.5.1988 (Substantive) 1.5.1989	20.5.1988 1.6.1988
Naib Subedar	13.4.1992 w.e.f. 1.1.1992	4.8.1993 w.e.f. 1.1.1992	
Subedar	Not promoted	20.9.1994 w.e.f. 1.3.1994	

The grievance made by the petitioner is that despite the fact that the petitioner was promoted as Acting Naik and Substantive Naik earlier to respondent no. 6 as also Acting Havildar and substantive Havildar and Naib Subedar the respondent no. 6 was declared senior to him vide order dated 16.4.1993/8.5.1993 (Annexure P.1). The date of promotion of respondent no. 6 as Naik and Substantive Naik were brought at par with the petitioner as is evident from the comparative table. On the basis of ante dating the date of promotion, the respondent no. 6 was promoted to the next rank of Naib Subedar w.e.f. 1.1.1992. The Piping Ceremony in that regard was held on 4.8.1993. According to the averments made in the petition all the changes were made at the back of the petitioner without issuing him any show cause notice. When a vacancy in the rank of Subedar occurred in the Regiment on 1.3.1994 the same was required to be offered to the petitioner as it is

claimed that he fulfilled the promotion criterion in respect of his ACRs which were “All High Average Reports”. However, the same could not be offered to him because respondent no. 6 after the grant of ante dated promotion was brought at par with the petitioner which resulted in his supersession for further promotion to the post of Subedar. Feeling aggrieved, he filed a non statutory complaint as per para 1(B) of the Army Order 133/77 and Para 364 of the Defence Services Regulations,Regulations for the Army, Volume I (Revised Edition) 1987 (for brevity 'the Regulations') read in conjunction with Sections 26 and 27 of the Army Act (Annexure P.2). The non statutory complaint submitted by the petitioner was forwarded to the Headquarters 9 Arty Brigade on 5.9.1994 alongwith relevant documents which fully supported his claim. The case was returned with the advise to put up a simple application for transfer out of the unit (Annexure P.3). The petitioner has alleged that respondent no. 6 did not fulfill the requisite ACR criterion and had not completed one year in the rank of Naib Subedar from the date of Piping Ceremony i.e. 4.8.1993 and was illegally promoted to the rank of Subedar on 20.9.1994 completely ignoring the claim of the petitioner. The petitioner filed statutory complaint on 25.9.1995 by attaching all documents claiming that notice was required to be issued to him when the dates of promotion of respondent no. 6 were ante dated (Annexure P.4). The petitioner retired from service on 30.9.1995 on completion of 26 years of service whereas on promotion he would have retired on the completion of 28 years of service as per Regulation 163 of the Army Regulations. It is claimed that respondent no. 6 remained junior to the petitioner for more than 10 years as Naik and Havildar and even as Naib Subedar. By supersession of the

petitioner for promotion to the post of Subedar he lost the pleasure of wearing the batch of superior post and his tenure was shorten by two years as he was retired after rendering 26 years of service whereas as Subedar he was to render 28 years of service as per Regulation 163 of the Regulations. Eventually, the petitioner served a legal notice through his counsel on 18.11.1995 and also sent a reminder (Annexures P.5 and P.6 respectively). The claim of the petitioner is that the order dated 8.5.1993 (Annexure P.1) giving retrospective promotion to respondent no. 6 be set aside as the same has been passed at the back of the petitioner and without issuing any show cause notice or granting any opportunity of hearing to him. Accordingly, it has been claimed that the petitioner be declared senior to respondent no. 6 and thus his claim be considered for promotion to the post of Subedar with all consequential benefits.

The stand of the respondents in the written statement is that respondent no. 6 was enrolled in the Regiment of Arty a month before the petitioner and therefore he was entitled to rank senior to him. It has further been pointed out that respondent no. 6 was entitled to be promoted being senior ahead of the petitioner and his service record has always been upto the mark. The assertion of the petitioner that infact respondent no. 6 was superseded having not been found fit and eligible by the Promotion Board has been controverted. It has been asserted by respondents on the basis of the available record that respondent no. 6 was fully eligible for promotion to the post of Naik at the relevant time when in 1983 and 1985 the Promotion Board had considered the case of the petitioner. On account of the mistake on the part of the Promotion Board, the petitioner had enjoyed promotions, appointment and financial benefits to which the petitioner was not entitled

to. It has further been clarified that respondent no. 6 preferred a non statutory complaint on 23.3.1992 against his supersession . Accordingly, he was granted seniority vide HQ letter No. A/10031/Camp/PC-113/Artillery 3 dated 16.4.1993 his Commanding Officer was directed to take the following action:

> " (a) Seniority of No. 125190 3 AHv (OPR) Prithvi Chand Chohan of 176 Field Regiment for promotion to the paid acting rank of Naik, Substantive Naik and Substantive Havildar be adjusted according to his original seniority in comparison to the two other individuals mentioned in the petition without any effect on pay and allowances.
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> (b) The NCO be promoted to the rank of Naib Subedar according to his readjusted seniority by grant of ante date seniority against overall deficiency of Regiment of Artillery and subsequently he be absorbed against the vacancy in OPR trade in the unit."

On the basis of the directions issued, the competent authority has ante dated the dates of promotion of respondent no. 6 who thereby has become senior to the petitioner in the rank of Naib Subedar. It is claimed that the petitioner was not superseded in any way and only justice was restored to respondent no.6. It has also been asserted that respondent no. 6 did not lack in any manner and deserved to be promoted on the dates which have been given by the amendment made by the impugned order dated 16.4.1993. The respondents have further asserted that meeting of the Promotion Board was held on 18.7.1994 and respondent no. 6 fulfilled the criterion of requisite ACR in the rank of Naib Subedar by virtue of ACR

initiated in May, 1994. On the basis of the directions of Army Head Quarter Artillery Records vide letter no. 275/D/UPB/176/M/25/Adm (JCOs) dated 12.9.1994, respondent no. 6 was granted Dry Seniority of Subedar (Operator) w.e.f. 1.3.1994 against the existing vacancy of Subedar. With regard to issuance of notice to the petitioner while ante dating the promotion of respondent no. 6 and restoring his seniority, the respondents have submitted that there is no provision of serving a notice on the petitioner or granting him an opportunity to be heard. It is claimed that the order has been passed on the basis of documentary evidence and record.

Shri B.S.Sehgal, learned counsel for the petitioner has argued that after promotion of the petitioner to the post of Paid Acting Naik on 9.12.1983, respondent no.6 is deemed to have been superseded who was promoted as paid Acting Naik on 1.7.1984. Learned counsel has maintained that the petitioner admittedly made a representation only in the year 1992 after a period of more than 9 years despite the fact that the petitioner has further been considered and promoted on the post of Paid Acting Havildar and substantive Havildar in 1988 whereas respondent no. 6 was made substantive Havildar w.e.f. 1.5.1989. He has maintained that before passing order dated 8.5.1993/ 22.4.1993 (Annexure P.1), the petitioner was required to be issued a show cause notice and only after grant of opportunity to him such an order could have been passed. In support of his submission, learned counsel has placed reliance on para 95 of the judgement of Hon'ble the Supreme Court in the case of Union of India v. Tulsiram Patel AIR 1985 SC 1416. He has also submitted that a settled seniority between the petitioner and respondent no. 6 could not have been reopened after a period of 9 years which results into cutting short his tenure of service by two years

had he been promoted as Subedar then it would result into addition of two years service. In support of the afore-mentioned submission, learned counsel has placed reliance on Regulation 163 of the Army Regulations. It has, however, been stated by the petitioner that at this stage only monetary benefits with all consequential relief could be released to the petitioner because the petitioner as also respondent no. 6 have retired from the post of Naib Subedar/ Subedar.

Mr. S.K.Sharma, learned counsel for the respondents, has however, argued that there is neither any provision for issuance of a show cause notice to the petitioner nor there was any necessity to do the same. He has further submitted that respondent no. 6 was ignored from promotion on account of mistake committed by the Promotion Board which had been rectified by order dated 8.5.1993/ 22.4.1993 (Annexure P.1) and thereby injustice caused to the petitioner has been undone.

After hearing learned counsel for the parties at length I am of the considered view that this petition deserves to be allowed. It is undisputed that the petitioner has been promoted on the post of paid Acting Naik and substantive Naik earlier than respondent no.6. The petitioner was promoted as Acting Naik on 9.12.1983 whereas respondent no. 6 could gain promotion only on 1.7.1984. They were further promoted as substantive Naik on 1.11.1985 and 1.4 1986 respectively. The position is the same with regard to their promotion as Havildar. The petitioner has been promoted in the year 1988 whereas respondent no. 6 was promoted in 1989. It has also not been controverted that no show cause notice was issued to the petitioner before granting ante dated promotion to respondent no.6. The stand of the official respondents that there is no provision in the Army

Regulations to issue such a notice is absolutely unsustainable because it is well settled that principles of natural justice are implied unless such principles are either excluded by an express provision made in the rules or it flows from necessary intendment. For the afore-mentioned view reliance can be placed on a judgement of Hon'ble the Supreme Court in case of Dr. Rash Lal Yadav v. State of Bihar (1994) 5 SCC 267. It has been held that natural justice has secured a foothold to supplement enacted law by operating as an implied mandatory requirement. After referring to the judgements in the case of A.K.Kraipak v. UOI (1969)2 SCC 262; State of Orissa v. Dr. (Miss) Binapani Dei AIR 1967 SC 1269; Union of India v. J.N.Sinha (1970) 2 SC 458 and Swadeshi Cotton Mills v. UOI AIR 1981 SC 818, their Lordships in paras 6 and 9 of the judgement in Dr. Rash Lal Yadav's case (supra) observed as under:

> " 6..... Therefore, where a statute confers wide powers on an administrative authority coupled with wide discretion, the possibility of its arbitrary use can be controlled or checked by insisting on their being exercised in a manner which can be said to be procedurally fair. Rules of natural justice are, therefore, devised for ensuring fairness and promoting satisfactory decision- making. Where the statute is silent and a contrary intention cannot be implied the requirement of the applicability of the rule of natural justice is read into it to ensure fairness and to protect the action from the charge of arbitrariness. Courts presume this requirement in all its width as implied unless the enactment supplies indications to the contrary.....
>
> 7 and 8 xx xx xx xx

> 9. What emerges from the above discussion is that unless the law expressly or by necessary implication excludes the application of the rule of natural justice, courts will read the said requirement in enactments that are silent and insist on its application even in cases of administrative action having all consequences.....”

The afore-mentioned view has also been followed and applied in the case of Pu Myllai Hlychho v. State of Mizoram (2005) 2 SCC 92. Therefore, the action of giving ante dated promotion to respondent no. 6 is vitiated as he also gained seniority over the petitioner. The whole act was without following the principles of natural justice. The afore-mentioned legal position would flow from para 95 of the judgement of Hon'ble the Supreme Court in the case of Tulsiram Patel (supra) and the same reads as under:

> “ The principles of natural justice have thus come to be recognized as being a part of the guarantee contained in Article 14 because of the new and dynamic interpretation given by this Court to the concept of equality which is the subject matter of that Article. Shortly put, the syllogism runs thus : violation of a rule of natural justice results in arbitrariness which is the same as discrimination; where discrimination is the result of State action, it is a violation of Article 14: therefore, a violator of a principle of natural justice by a State action is a violation of Article 14. Article 14 however is not the sole repository of the principles of natural justice. What it does is to guarantee that any law or State action violating them will be struck down. The

> principles of natural justice, however, apply not only to legislation and State action but also where any tribunal, authority or body of men, not coming within the definition of " state" in Article 12, is charged with the duty of deciding a matter. In such a case, the principles of natural justice require that it must decide such matter fairly and impartially."

Therefore, the impugned order dated 8.5.1993/ 22.4.1993 (Annexure P.1) ante dating promotion of respondent no. 6 is liable to be set aside as the same has been passed in flagrant violation of the principles of natural justice.

It is equally well settled that the issues concerning seniority cannot be re-opened at the instance of an employee after undue delay and laches. In that regard reliance may be placed on a Constitution Bench judgement of Hon'ble the Supreme Court in the case of Rabindra Nath Bose v UOI AIR 1970 SC 470. In para 34 of the afore-mentioned judgement it has been laid down that in the absence of any satisfactory explanation for inordinate delay, the petitioner could not approach the Supreme Court under Article 32 of the Constitution. The afore-mentioned para reads as under:

> " ... But after carefully considering the matter, we are of the view that no relief should be given to the petitioners who without any reasonable explanation, approach this Court under Article 32 of the Constitution after inordinate delay. The highest Court in this land has been given Original Jurisdiction to entertain petitions under Article 32 of the Constitution. It could not have been the intention that this Court would go into stale demands after a lapse of years. It is said that Article 32 is

itself a guaranteed right. So it is, but it does not follow from this that it was the intention of the Constitution makers that this Court should discard all principles and grant relief in petitions filed after inordinate delay."

What is true about Article 32 of the Constitution would equally be applicable to the petition filed under Article 226 of the Constitution. Therefore, in any case, the respondents could not have re-opened the issue after the petitioner has enjoyed seniority over respondent no. 6 from 1983 to 1993. On that account also, the order dated8.5.1993/ 22.4.1993 (Annexure P.1) is liable to be set aside.

The question now arises is as to what relief could be granted to the petitioner because it is admitted fact at both hands that petitioner as well as respondent no. 6 have retired from service. Therefore, quashing of order dated 8.5.1993/ 22.4.1993 (Annexure P.1) would result into extreme prejudice to respondent no.6 as he may have to be reverted which would be improper after his retirement. All the same the right of the petitioner for consideration of his case for promotion to the post of Subedar cannot be denied to him. Accordingly, while moulding the relief I hold that the petitioner was entitled to be considered for promotion to the post of Subedar w.e.f. the date respondent no. 6 had been promoted. Accordingly, a direction is issued to the respondents to consider the case of the petitioner for promotion to the post of Subedar by creating a super numerary post, if necessary. If he is found suitable according to the criterion applicable at the time when the case of respondent no. 6 was considered and he was promoted then he shall be given promotion as Subedar with all consequential benefits including the benefit of two years extended service

as has been laid down by Regulation 163 of the Regulations. It is appropriate to mention that Regulation 163 lays down that a person who is found suitable for promotion as Subedar is to retire after rendering 28 years of service whereas a person who fails to get promotion as Naib Subedar after he had completed 26 years of service. The petitioner, therefore, would be entitled to salary for a further period of two years and would be deemed to have retired as Subedar. He shall also be entitled to all consequential benefits towards pension etc. which may be calculated and paid to him, after adjusting the pension, if any, paid to the petitioner, within a period of three months from the date certified copy of this order is received by official respondents.

(M.M.Kumar)
Judge

15.11.2006
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